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Supreme Court of the United States

OCTOBER TERM, 1907.

CONTINENTAL WALL PAPER COMPANY,
Petitioner,

vs.

THE LEWIS VOIGHT & SONS COMPANY,
Respondent.

Brief for Respondent.

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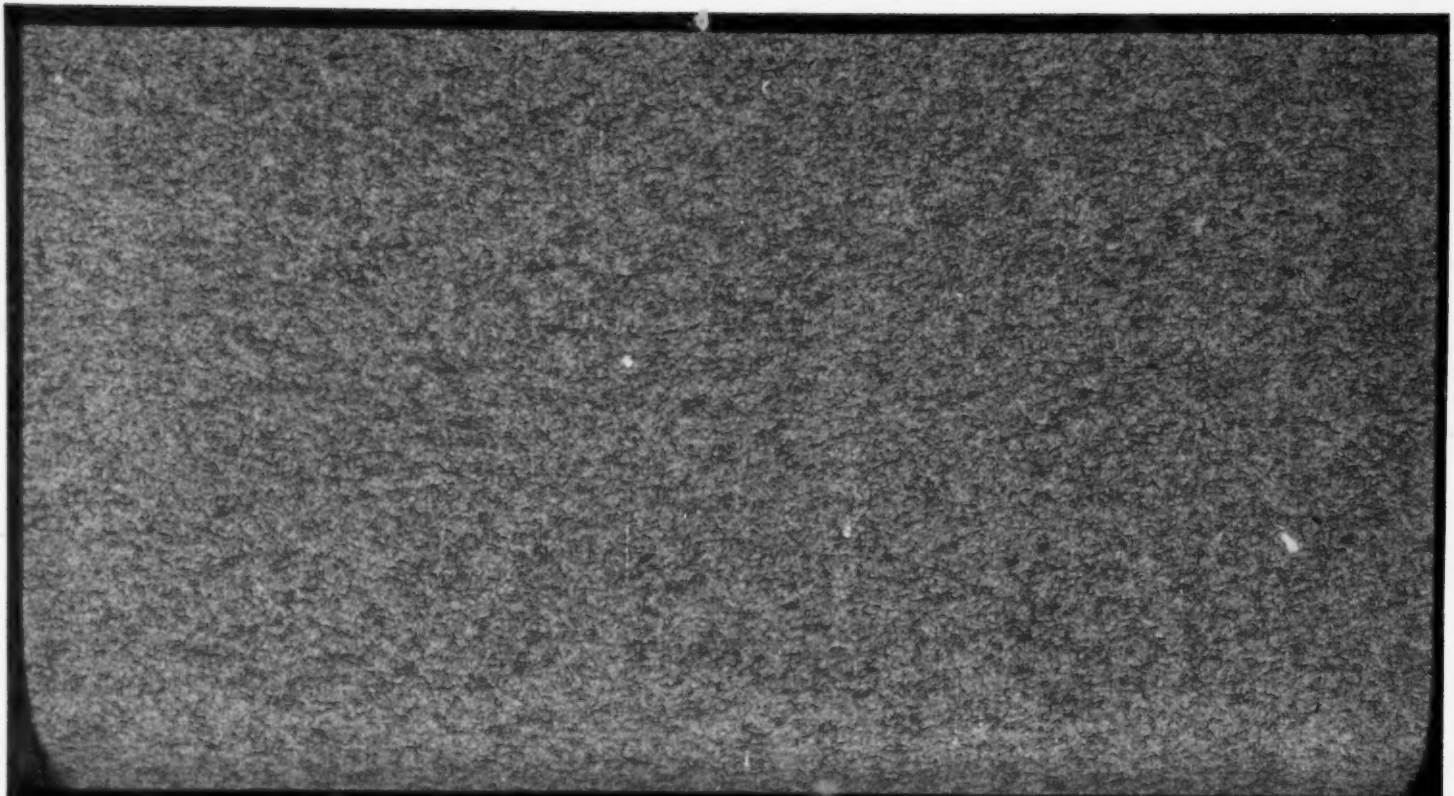

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Petitioner,

No. 212. vs.

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Brief for Respondent.

The petitioner, by these proceedings, seeks to reverse a judgment entered in the Circuit Court of the United States, Southern District of Ohio (Rec., p. 439), recently affirmed by the United States Circuit Court of Appeals for the Sixth Circuit (Rec., p. 447), which judgment dismissed the petition of the plaintiff below, who is the petitioner here, at its costs. This action in the Circuit Court followed the overruling of the demurrer of the plaintiff to the third defense in defendant's amended answer, and was based upon the election of the plaintiff not to plead further. The demurrer and the action of the

plaintiff in electing not to plead further, are confessions of the truth of the facts alleged in said third defense.

I.

This third defense to the amended answer (Rec., pp. 387-399) sets forth various facts showing the formation in 1898 of a trust or unlawful combination in the wall paper business in the United States, to which ninety-eight per cent. of the manufacturers of wall paper, the plaintiff, all the manufacturers of wall paper machinery, *and all the wholesalers, jobbers and quantity buyers, including the defendant, were parties under various agreements and contracts,* which agreements and contracts were contrary to public policy and void:

(*a*) At common law;

(*b*) Under the laws of the state of New York where the agreements were entered into and the contracts signed;

(*c*) Under the laws of the state of Ohio where they were to be carried out in part and the goods delivered, and thereafter to be sold for delivery in various states;

(*d*) And under the act of Congress commonly known as the "Sherman Act";

And further that the suit in form on an account set forth in the petition as amended was an attempt to enforce said illegal trust agreements.

A reading of the third defense is necessary to an understanding of the position of the defendant.

In brief the facts alleged in this third defense and admitted by the plaintiff to be true and which show the existence of this illegal combination are these:

Prior to 1898 there were in existence in the United States some thirty-five factories manufacturing wall paper, controlling upwards of ninety-eight per cent. of the business of the country in that commodity (Rec., p. 389). Seventeen of them were owned by the National Wall Paper Company and eighteen by independent firms, individuals or corporations. They were located in seven states: New York, Pennsylvania, Massachusetts, New Jersey, Maryland, Delaware and Ohio. They were in free and unrestricted competition with each other, and all were engaged in interstate commerce throughout the United States. There were two manufacturers of wall paper machinery: one located in New Jersey, the other in Wisconsin (Rec., p. 394). There were wholesale dealers like the defendant, and retail dealers scattered all over the country. The defendant was such a jobber or wholesale dealer, at Cincinnati, who bought goods from the manufacturers in other states (Rec., pp. 387, 388), and sold goods through Ohio, Kentucky, Indiana and Illinois and other states and territories (Rec., p. 396).

In July, 1898, the scheme was devised to unite all the manufacturers and wholesalers and jobbers of wall paper and manufacturers of wall paper machinery in a combination to control this business. The retailers and consumers were alone left out.

The manufacturers agreed with one another that, while they should retain the ownership of their several plants and businesses and preserve their separate indentities and operate said several manufactories and businesses as before, the control of said several businesses in all matters relating to and affecting the production of said establishments and the prices and sale of wall paper and the clas-

sification of dealers should be placed under the control of a committee, which would adopt regulations and rules governing the manner of conducting the business of all the said manufacturers, including the fixing of prices and the division of the profits (Rec., pp. 389-390).

In carrying this agreement into effect, the following plan was devised (Rec., pp. 389, 390): The plaintiff corporation was to be organized under the laws of New York, with a capital stock of $200,000, divided into 16,000 shares of $12.50 each, for the ostensible purpose of taking the entire output of wall paper to be manufactured. The stock was to be divided among the manufacturers in proportion to the number of rolls of paper manufactured by them the preceding year. It was to be paid for in cash and immediately endorsed in blank and deposited with the plaintiff (Rec., pp. 390, 394, 406, 409). As the National Wall Paper Company controlled about one-half of the business, it was to name three so-called directors of the company and the other manufacturers another three, and these six were to choose a seventh, a sort of umpire (Rec., p. 390), who would together in reality constitute the aforesaid committee (Rec., p. 295). Then a contract (Ex. 1—Rec., p. 406) was to be entered into between each of the manufacturers and the corporation so organized, viz., the plaintiff. Another contract (Ex. 2—Rec., p. 419) was to be entered into between the plaintiff and each jobber, of which three classes, known as "First," "Second" and "Third" Class Jobbers were to be formed (Rec., p. 395). The plaintiff under the terms of the written agreement was to sell the goods to the jobber. A third contract (Ex. 3—Rec., p. 433) was to be entered into between each man-

ufacturer and any other purchaser of wall paper in large quantities, known as a "quantity buyer" (Rec., p. 396).

The manufacturers, under the terms of said written agreement, were to sell the wall paper to the "quantity buyers" for the account of the plaintiff. All other purchasers of wall paper were to buy their goods at certain fixed prices, known as "list prices," and all the manufacturers, jobbers and "quantity buyers" were to agree with the plaintiff not to sell any wall paper to any one at less than such "list prices." These list prices were embodied in and made part of the contracts and are the same in each (See Exhibits 1, 2, 3—Rec., pp. 412, 415, 416, 421, 427, 433).

All wholesalers and jobbers were also to be compelled to agree to buy from no one but the manufacturers of wall paper who were parties to the scheme, which agreement was to be in some form that would disguise the real nature of the transaction (Rec., p. 391).

In order to secure the faithful performance of these agreements and to prevent their violation by any member of the combination, whether in his capacity as manufacturer, jobber or quantity buyer, the following devices were adopted:

"Good faith" was to be secured on the part of the manufacturers by their furnishing statements and invoices of sales to the company and permitting the latter to audit their books (Rec., pp. 392, 393, 408), and further by their paying into the treasury of the plaintiff $200,000 as subscriptions for stock and at the same time depositing their stock with the company to be taken as liquidated damages in case of any violation of their contracts (Rec., pp. 394, 406, 409). Since the contracts were illegal, neither

party to them could ever recover upon them, and the manufacturers could neither get back their stock nor their money if they violated the terms of their contract. Again, "good faith" was further to be secured on the part of the manufacturers by removing all temptation to violate the agreement, because of the tying up of the wholesale trade by agreements compelling them to buy only from those in the combination. A manufacturer, violating the terms of his agreement, would find no market for his product.

The same "good faith" was to be secured on the part of the jobbers and quantity buyers by refusing to let them have any paper from practically the only sources in the country whence it could be procured, if they bought paper from any one else or sold what they bought at any time at less than list prices (Rec., pp. 391, 394, 395, 419, 433).

To make sure that no other persons could manufacture wall paper, all makers of wall paper machinery agreed not to sell such machinery to any one but the plaintiff and the manufacturers who were in the combination (Rec., p. 394); and to prevent the manufacturers from increasing their capacity, and thus exposing themselves to the temptation of selling their product at less than list prices, they agreed not to run their factories longer than ten hours a day and to put in no machinery except to replace old machines which were discarded (Rec., pp. 393, 408, 409). Competition and cutting of prices in the United States by Canadian members of the trade were also prevented by appropriate agreements (Rec., p. 396).

Nominally the plaintiff was to buy the entire product of all the factories at prices which were the estimated cost of the manufacture and incidental expenses (Rec., pp.

391, 406). All contracts with and collections from jobbers were to be in the plaintiff's name, but the contracts with and collections from quantity buyers and other purchasers were to be attended to by the manufacturers (Rec., pp. 391, 392, 406, 407).

In reality the agreement was, and so the business was carried on, that the manufacturers should maintain sample rooms and selling agents and solicit and receive orders from all wholesalers, whether jobbers or quantity buyers; that the entire business should be done by the manufacturers, but payments should be made by the jobbers to the so-called company, the plaintiff (which was designated in the written agreement as "selling agent," Rec., p. 406), and by wholesalers, other than jobbers, directly to the manufacturers (Rec., pp. 392, 397).

Blank forms of contract for the different members were prepared and agreed upon and the prices fixed (Rec., pp. 390, 395, 396, 407). The combination was to last one year, with privilege of two renewals for one year each under certain conditions (Rec., pp. 394, 406, 407).

The plaintiff was to have general supervision of the business of each manufacturer, with the right to examine its books and establish a general system of accounting (Rec., pp. 393, 408). All invoices of sales were to be furnished and accounted for to the plaintiff (Rec., p. 392). The profits of the manufacturers were to be divided in the form of dividends on the stock based upon capacity and without reference to actual sales made by any manufacturer (Rec., p. 391). The profits of the jobbers were the difference between the list prices and the discounts allowed.

The foregoing scheme was completely carried out. Pursuant to said agreement, the defendant and every other jobber and wholesaler of wall paper in the United States, and all persons engaged in commerce in the wall paper trade, were compelled to, and did, sign the agreements contemplated as aforesaid, copies of which are attached to the answer as Exhibits 2 and 3, by which means competition between the manufacturers and the vendors of wall paper and between jobbers and wholesalers was stifled, and the price of wall paper unduly enhanced, making it 50 per cent. higher than it would otherwise have been (Rec., pp. 396, 397; Exhibit 2—Rec., p. 419; Ex. 3—Rec., p. 433).

The prices charged for merchandise in the exhibits attached to the amended petition are the prices fixed and determined in pursuance of and by the combination or trust agreement, and are at least one-half more than they would otherwise have been. All of said business was transacted in pursuance of said trust agreement (Rec., pp. 398, 399). The manufacturers in the combination used the plaintiff only as a cloak. They themselves, as before, maintained sample rooms and selling agents, and solicited and received orders (Rec., p. 392). The itemized accounts which plaintiff was compelled to furnish by way of amendment to its petition, are accounts of manufacturers, and not of the plaintiff with the defendant (Rec., pp. 41-350 inc.).

The suit by plaintiff on an account is an attempt to enforce the illegal agreement.

II.

This Case Does not Involve the Claim that a Third Person Purchasing From an Illegal Trust Can, Because of that Illegality, Escape Payment for Articles Purchased.

The plaintiff in error will doubtless insist here, as below, that this defense involves a contention upon the part of the defendant that a third person outside of a trust buying goods from the trust can set up in defense to an action for the purchase price of the goods, that the plaintiff is an illegal combination or trust. No such contention is made upon behalf of the defendant and it is conceded that no such defense would be effective. Were there ever any doubt of the proposition, such doubt has been removed by the decision of this court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 545.

This case adopted the principle announced in many *nisi prius* cases prior thereto.

> *Edison Elec. Lt. Co.* v. *Sawyer-Mann Elec. Co.*, 53 F. R., 592, 598.
> *Amer. Soda Fount. Co.* v. *Green*, 69 F. R., 333.
> *Empire Dis. Co.* v. *McNulta*, 77 F. R., 700.
> *Olmstead* v. *Dis. & Cattle Feed Co.*, 73 F. R., 44.
> *Dennehy* v. *McNulta*, 86 F. R., 825.
> *Brown Saddle Co.* v. *Troxel*, 98 F. R., 620.
> *Nat'l Folding Box & Pa. Co.* v. *Robertson*, 99 F. R., 985.
> *Otis Elev. Co.* v. *Geiger*, 107 F. R., 131.
> *Harrison* v. *Glucose Sug. Ref. Co.*, 116 F. R., 304, p. 308.

Combinations in restraint of trade and commerce are illegal and have been made by statute criminal, but they are not outlawed. Had the scheme been confined to the

agreements actually made between the manufacturers and the plaintiff (Exhibit 1 to answer) there would have been a solid basis for the argument that the defendant could not set up the illegal character of those contracts either at common law or under the statutes to defeat a suit for the purchase price of goods sold to defendant.

The scheme and the agreements entered into to carry it into effect were not, however, confined to the plaintiff and the manufacturers. The defendant and every wholesale dealer in wall paper in the United States were parties to the scheme, and, in pursuance of the plan adopted, entered into contracts with the plaintiff containing provisions adapted to the purpose of carrying out the illegal objects of the trust and intended so to do, that is, to enhance and fix prices, to stifle competition and to restrain trade between the states (Rec., p. 397; Exhibits 2 and 3 attached to answer at Rec., pp. 419, 433). Plaintiff is now suing upon one of the contracts, though in the short form, on an account permitted by the Ohio code.

This position is more fully presented hereafter in the brief but is now noted at the outset, because much of the brief of the other side is based on the assumption that the Connolly case controls.

III.

The Combination is One in Restraint of Trade or Commerce Among the Several States and an Attempt to Monopolize the Wall Paper Trade or Commerce Among the States.

The question is not, as treated by counsel for plaintiff in error, simply one as to whether or not the plaintiff com-

pany is a trust or unlawful combination. It is that and much more, for the plaintiff company is but an incident in the general scheme which embodies a combination between the manufacturers and wholesale dealers throughout the country. Plaintiff's corporate organization can not be used as a cloak to cover the illegal contracts between the parties to the scheme, nor does it make legal that scheme which without it would be clearly illegal.

Northern Securities Co. v. *U. S.*, 193 U. S., 197.
Distilling Co. v. *People*, 156 Ill., 448.
Harding v. *Glucose Co.*, 182 Ill., 551.
Richardson v. *Buhl*, 77 Mich., 632, 656 *et seq.*

The court will look through it for the intent of the real parties to the agreements forming the scheme, and will not be stopped by its nominal capitalization, which is less than a year's purchases of wall paper by the defendant alone (Rec., pp. 3, 398, 399), and only 1-190 part of the capitalization of the National Wall Paper Co., one of its constituent companies (Rec., pp. 352, 353). The court will see, as is alleged and admitted, that the agreements with and sales to the defendant were in fact made by the manufacturers, parties to the scheme (Rec., pp. 389, 390, 392, 399), and that the plaintiff is but a nominal party to them all.

The language of Judge Minshall in *State* v. *Standard Oil Co.*, 49 O. S., 179, is applicable although used of the converse of the proposition:

> "Now, so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question, but

> where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act, can not preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law, fraud would enjoy an immunity awarded to it in no other."

The scheme was not confined to the manufacturers alone, as in *U. S.* v. *Knight*, 156 U. S., 1.

Though limiting, controlling and regulating production, its general object and scope was to control the manufacturing, buying, selling and dealing in wall paper, to be transported among the several states from a time anterior to its manufacture, until it reached, through the manufacturers, the plaintiff, and through the plaintiff, the wholesalers, through the wholesalers, like the defendant, the retail dealers and consumers, in Ohio, New York and other states.

Different functions in accomplishing this purpose were alloted to different members. To the plaintiff was al-

lotted the task of keeping the manufacturers to their bargains as to prices, etc., and making contracts in its name with the jobbers and seeing that these contracts were observed; to the manufacturers was allotted the task of manufacuring the goods and selling to all purchasers, except jobbers, at the prices named, and not producing more wall paper than a fixed amount, viz., the then capacity of their mills; to the jobbers and quantity buyers, such as the defendant, was allotted the task of buying only from the plaintiff and the manufacturers, and selling only at prices which the manufacturers, the plaintiff and the wholesalers and the jobbers had agreed upon. Each party to the scheme and every contract in reference to it was an integral and necessary part to make effective the purposes of crushing out competition, enhancing and fixing the prices, and monopolizing the wall paper industry of the United States.

To the retailers of wall paper and consumers was allotted the task of paying the bills.

There could have been no other object than the enhancement and control of prices and the restraint of trade for the purpose of enhancing prices. It is so alleged and the demurrer admits such to be the fact. All the factories (so-called vendors) in the combination maintained sample rooms and selling agents, and solicited and received orders, just as before the combination (Rec., p. 402, par. 3). The Continental Wall Paper Company did not, therefore, work an economy of expenses for the several factories in the combination by combining, and therefore decreasing the aggregate sales expense, but on the contrary, increased expenses, for the factories in the combination were compelled to send duplicate bills to the Continental Wall

Paper Company every time they made a sale to a customer and the Continental Wall Paper Company was obliged to maintain bookkeepers to properly enter these duplicate accounts, to pay dividends, maintain an organization, etc.

The combination was not, therefore, formed for the purpose of economizing expense, but its sole and only purpose and object was to enhance prices and restrict competition. After the combination was made complete (embracing more than 98 per cent. of all wall paper manufacturers and all manufacturers of wall paper machinery) and the agreements had been signed by the several factories, and by their creature, the Continental Wall Paper Company, and the wholesalers had been compelled to sign the agreements, Exhibits 2 and 3, it was thereafter impossible.

1. For any manufacturer of wall paper to sell, except at trust prices.

2. For any jobber of wall paper to buy, except at trust prices.

3. For any jobber to buy wall paper at any price, unless assenting to the combination's exactions, and becoming a party to the scheme and entering into the illegal agreement.

4. For any retail dealer in wall paper to buy of any jobber, except at trust prices.

5. For any individual consumer of wall paper to buy from any retailer, except at prices exacted as a result of the combination.

6. And finally, by reason of the control of all concerns manufacturing wall paper machinery in this country and Canada, no person or persons, firm or corporation could start up an independent factory.

A MORE COMPLETE AND EFFECTIVE COMBINATION TO RESTRICT COMPETITION AND ENHANCE PRICES COULD NOT BE IMAGINED.

Thus treating the matter, as it must be treated, as one general scheme, all one agreement, it is too plain for argument that it comes within the common law inhibition against contracts in restraint of trade, as well as the statutes. It is a method of treatment which plaintiff avoids. It would like to take up one part of the scheme and treat a contract in reference to that part as the only fact to be considered. That, however, will not answer. As said by Mr. Justice Peckham in *Addyston Pipe & Steel Co.* v. *The United States*, 175 U. S., 211, at page 245:

> "All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce."

Mr. Justice Holmes, in *Swift & Co.* v. *U. S.*, 196 U. S., 375, 396, said:

> "The scheme, as a whole, seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S., 194, 206."

It was also said by Mr. Justice Peckham, in *Montague* v. *Lowry*, 193 U. S., 38, 45, in arriving at the conclusion that the scheme therein considered related to interstate commerce, and, therefore, within the prohibition of the Sherman Act:

> "The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties, as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme, which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole, the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to, and is, a contract or combination in restraint of interstate trade or commerce."

Mr. Chief Justice Fuller has, within a few months, used similar language in reference to treating the scheme or combination as a whole, in *Loewe* v. *Lawlor*, 208 U. S., 274, 28 Supreme Court Reporter, 301, at p. 309.

The scheme now in question in this case was so treated and held, as an entirety, by Judge Wing in the Northern District of Ohio, in a case between the Continental Wall Paper Company and William H. Findlay et al, involving precisely this defense in a precisely similar case, on precisely similar facts. He said:

"By the third defense, it appears that the contract of sale, upon which is founded the claim of the plaintiff, if any it have, was one to which the plaintiff and many manufacturers of wall paper and the defendants were parties. In this contract, which is Exhibit 3, attached to the answer, is found the following clause: 'It is an essential condition of this agreement, that the jobber will not, directly or indirectly, sell, or offer for sale, any of the merchandise purchased from the company hereunder, at lower prices, or upon better or more favorable terms than those shown in Schedule B; the intent hereof being to insure the company against the use by the jobber of this agreement to undersell the company.' This is clearly a contract in restraint of trade. The provision quoted inures to the benefit of the plaintiff and of a great number of manufacturers of wall paper located in various states of the Union. The business of the defendants, in the sale of wall paper, was carried on, as jobbers, in several states of the Union. The effect, therefore, of this provision of the contract, was to restrain commerce among the several states. It appears from this defense that it will be necessary for the plaintiff, in establishing its right to recover from the defendants, to rely upon this illegal contract. It is the undisputed law that, in such a situation, the court will refuse, not only to enforce such contract, but any alleged rights directly springing from it. Therefore, the demurrer to the third defense is overruled."

IV.

This Combination Was an Illegal Trust, and an Unlawful Combination Within the Meaning of the Statutes.

It is hardly necessary to discuss the proposition that this combination was not an illegal trust or unlawful combination within the meaning of the state or federal statutes.

If there are any cases to the contrary, they have been effectually disposed of in the case of *The United States* v. *The Addyston Pipe & Steel Company*, 85 F. R., 271, as affirmed by this court 175 U. S., 211, 244, and in its later decisions.

It is only necessary to refer to the following decisions, some of which have arisen under the Sherman Act, and some without reference to statutes, but all of which have involved the direct consideration of the illegal agreement or combination:

U. S. v. *Trans. Mo. Frgt. Assn.*, 166 U. S., 290.
U. S. v. *Joint Traf. Assn.*, 171 U. S., 505.
Montague v. *Lowry*, 193 U. S., 38.
Northern Securities Co. v. *U. S.*, 193 U. S., 197.
Swift & Co. v. *U. S.*, 196 U. S., 375.
National Cotton Oil Co. v. *Tex.*, 197 U. S., 115, 129.
U. S. v. *Jellico C. & C. Co.*, 46 F. R., 432.
Amer. Bis. Mfg. Co. v. *Klotz*, 44 F. R., 721.
Oliver v. *Gilmore*, 52 F. R., 562.
C., M. & St. P. R. Co. v. *Wab., S. L. & E. R. Co.*, 61 F. R., 993, 997.
Nat'l Harrow Co. v. *Hench*, 83 F. R., 36, 38.
Nat'l Harrow Co. v. *Hench*, 84 F. R., 226.

U. S. v. *Coal Dealers' Assn.*, 85 F. R., 252.
Cravens v. *Carter-Crume Co.*, 92 F. R., 479, 485.
Lowry v. *Tile & G. Assn.*, 98 F. R., 817, 826.
Lowry v. *Tile & G. Assn.*, 106 F. R., 38.
Montague v. *Lowry*, 115 F. R., 27.
U. S. v. *C. & O. Fuel Co.*, 105 F. R., 93.
C. & O. Fuel Co. v. *U. S.*, 115 F. R., 610.
City of Atlanta v. *Chat., F. & P. Co.*, 101 F. R., 900.

The cases which apparently hold the contrary, such as—

Olmstead v. *The D. & C. F. Co.*, 77 F. R., 265;
In re Green, 52 F. R., 104;
Deuber Watch Co. v. *E. Howard W. & C. Co.*, 66 F. R., 637;
Continental Ins. Co. v. *Bd. of Und.*, 67 F. R., 310,

are based on *The Mogul Steamship Co.* v. *McGregor*, L. R. (1892), Appeal Cases, 25, or are overruled, as pointed out in *The Addyston Pipe Case*, 85 Fed., 286, 300, or are distinguished in that case.

The cases, federal and state, also establish the further proposition, that a contract in restraint of trade, though on its face not unreasonable, and hence not void at common law, may become such if it is simply a part of a general scheme or one step towards the accomplishment of the purpose to restrain competition and establish a monopoly.

U. S. v. *Addyston P. & S. Co.*, 85 F. R., 271, 285, 291, and cases cited.
Cravens v. *Carter-Crume Co.*, 92 F. R., 479, 485.
Detroit Salt Co. v. *Nat'l Salt Co.*, 134 Mich., 103. 120.
Pacific Fac. Co. v. *Adler*, 90 Cal., 110.
Finck v. *Granite Co.*, 187 Mo., 244, 2d syl. and opin., p. 269.

Of course parties to such a combination can not plead an honest intent in forming the combination, or the reasonableness of the restraint; under statutes forbidding such combination or agreement, such defenses are immaterial.

U. S. v. *Joint Traf. Assn.*, 171 U. S., 505, 565.
Addyston P. & S. Co. v. *U. S.*, 175 U. S., 211.
U. S. v. *C. & O. Fuel Co.*, 105 F. R., 93.
C. & O. Fuel Co. v. *U. S.*, 115 F. R., 610, 619.
U. S. v. *Hopkins*, 82 F. R., 529.
U. S. v. *Coal Deal. Assn.*, 85 F. R., 252, 262, 264.
U. S. v. *Addyston P. & S. Co.*, 85 F. R., 271, 278, 291.

Contracts and conspiracies which prevent free and unrestricted competition in interstate commerce are within the condemnation of the federal statute.

Montague v. *Lowry*, 193 U. S., 38.
Northern Securities Co. v. *U. S.*, 193 U. S., 197.
Loewe v. *Lawlor*, 208 U. S., 274, 28 Supreme Court Reporter, 301.

Since the decision of the Circuit Court of Appeals in this case reported in 148 Federal Reporter, p. 939, the Circuit Court of Appeals of the 3rd Circuit has decided two cases involving trusts or combinations and its decisions therein are in accord with this line of authorities:

Jayne v. *Loder*, 149 Fed. R., 21, a case of a combination between manufacturers, jobbers and retailers.

Wheeler-Stenzel Co. v. *National Window Glass Jobbers Assn.*, 152 Fed. R., 864, a case involving a combination of jobbers worked out through a corporation formed for the purposes of negotating sales of goods to them.

The Circuit Court of Appeals in the 5th Circuit had decided a case in which was cited with approval the decision of the Circuit Court of Appeals in the 6th Circuit in this case:

McConnell v. *Camors-McConnell Co.*, 152 Fed. R., 321.

The Circuit Court of Appeals of the 6th Circuit has also re-examined the questions in this case and extended the application of the principles involved in this case in *Park & Sons Co.*, v. *Hartman*, 153 Fed. R., 24.

The state courts have with great unanimity held combinations like that under discussion to be illegal. We select a few with provisions in the agreement which bear resemblance to those of the wall paper trust for citation here. Many others will be found at pages 20 to 23 in the brief for the defendants in error before the Circuit Court of Appeals in this case, which is attached and made part of the answer to the petition for *certiorari*, and now on file in this case.

Finck v. *Granite Co.*, 187 Mo., 244.

Pocahontas Coke Co. v. *Powhatan Coal & Coke Co.*, 60 W. Va., 508; 56 S. E. R., 264.

Hastings Industrial Co. v. *Baxter*, 102 S. W. Rep., 1075.

American Handle Co. v. *Standard Handle Co.*, 59 S. W., 709 (Tenn.).

Cumming v. *Union Blue Stone Co.*, 164 N. Y., 401, 404-6.

Cohen v. *Berlin & Jones Envelope Co.*, 166 N. Y., 292, 300-304.

Wheeler-Stenzel Co. v. *National Window Glass Jobbers' Assn.*, 152 Fed. R., 864 (C. C. A. 3d Cir.).

The above are instances where those in the combination retain control of their own business but form a corporation to, or through which sales are made, or through which purchases are made of all the product made by or merchandise dealt in by the conspirators. There are also cases like the above where the control is exercised by a corporation owning the stock of the corporations taken into the combination. Among these may be mentioned:

Northern Securities Co. v. *U. S.*, 193 U. S., 197.
Burrows v. *Interborough Metropolitan Co.*, 156 F. R., 389.
Southern Electric Securities Co. v. *State*, 44 So. Rep., 785 (Miss., 1907).

Other cases holding illegal a combination effected through a corporation formed for the purpose of taking over, owning and operating or closing down competing plants, are the following:

Distilling Co. v. *People*, 156 Ill., 448.
Harding v. *Blue Coat Co.*, 182 Ill., 551.
Richardson v. *Buhl*, 77 Mich., 632, 656 *et seq.*
Detroit Salt Co. v. *National Salt Co.*, 134 Mich., 103.

Other illustrative and leading cases are the following:

Straus v. *American Publishers' Assn.*, 177 N. Y., 473.
Nester v. *Brewing Co.*, 161 Pa. St., 473.
Vulcan Powder Co. v. *Powder Co.*, 96 Cal., 510.
Beechley v. *Mulville*, 102 Iowa, 602.
Bailey v. *Master Plumbers*, 103 Tenn., 99.
Klingel v. *Sharp*, 104 Md., 218.

V.

The Contract Between Plaintiff and Defendant, Under Which Arises the Account Sued on, is a Part of and Directly Connected With the Illegal Combination, and Hence, Unenforceable, and not Merely a Collateral or Independent Contract.

A consideration of the allegations of the third defense demonstrates that the contract, Exhibit 2 (Rec., p. 419), which was made between the plaintiff and the defendant, and also as a part of the same scheme between the plaintiff and every other jobber in the United States (Rec., pp. 396-397) was not collateral to the scheme or combination, or independent of it. The purposes of the combination were at least two-fold, namely, to effect a monopoly of both the manufacturers of and the trade in wall paper, and second, to enhance prices. Exhibit 2, in the light of the facts pleaded, when made, as it was, between the plaintiff and every other jobber and wholesaler in the country, was intended and calculated to effect both of these objects. The jobber undertook to buy all of his paper up to a certain amount, which amount was more than double what he had ever used, or was likely to use, from the plaintiff alone, and he also agreed not to sell at prices lower than those fixed by the plaintiff and to which every other jobber agreed, and the performance of these undertakings was a condition on which alone he could continue to receive goods from the plaintiff or its constituent companies representing the manufacturers of upwards of 98 per cent. of the wall paper manufactured in this country. The first of the above mentioned undertakings was equivalent to an agreement by the jobber or

wholesaler not to buy from any other person than the manufacturer. When made, as it was, by all the jobbers and wholesalers it assured the vendors in the combination a monopoly of the market. It prevented any of those within the combination from dropping out, for they would find no market outside.

The second agreement when likewise, as it was, entered into by all the jobbers and wholesalers, prevented competition among the jobbers and wholesalers, just as the execution of Exhibit 1 by all the vendors precluded competition among the latter. The fact that all wholesalers did enter into such agreements was all that made it possible for them to buy at the combination's advanced prices with the hope of a profit. It was the sugar coating that went with the compulsory threats set out in the answer, to the effect that unless such agreements were signed by all the jobbers they would be driven out of business from sheer inability to get goods.

These provisions of the contract, therefore, constituted the means by which the wholesale trade was brought into and made a part of the combination, carrying most effectually the iniquities of the combination, restraining and monopolizing the wall paper trade and commerce among the states, clear down to the ranks of the retailers and consumers.

It is clear that this is not a mere case of a sale by a monopoly or a trust to a third person and that the objection raised by the defendant is not the same as that which would be raised by an outsider purchasing from a trust.

So much is made in argument of the case of *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., 540, as well as

of the cases decided upon the same principle, that it is proper to say a word or two further in connection with that case.

It merely decides that the objection that a corporation is a trust or monopoly arising and existing in violation of law, can not be urged by one who has voluntarily entered into a contract with it which is independent of and has no relation to its unlawful purposes, for the sake of avoiding such contract.

The converse, however, of the proposition is equally true, namely: that if the contract entered into is not independent of but is made in execution of and in furtherance of the unlawful purposes sought to be accomplished and as part of the scheme, no suit can be maintained by either party upon such a contract.

The case of *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., pp. 548 and 549, brings out this distinction clearly. In that case Connolly defended solely upon the ground that the plaintiff company was a trust and his defense was overruled. He did not, as does the defendant in this case, allege or rely upon the fact that his contract with the Union Sewer Pipe Company was in itself illegal, or a part of the general plan to enhance prices and stifle competition. Had he done so his defense might have been successful, because the record shows that the contract actually made by Connolly with the Union Sewer Pipe Company had in it elements of illegality entirely independent of the illegal character of the plaintiff company. As pointed out by Mr. Justice Holmes, speaking for the court, in the recent case of *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S., 390, 397:

> "The sale" (to Connolly as presented to this court) "was not so connected in its terms with the unlawful combination as to be unlawful."

He, however, based his defense solely upon the fact that the Union Sewer Pipe Company was a trust and sought to avoid the payment of the purchase-price of the goods on that ground alone. He largely relied upon the Illinois statute which recognized such defense but which was held unconstitutional.

All the other cases cited by plaintiff are founded upon well recognized distinctions which differentiate them from the case at bar. They fall under various classes, as follows, and must be distinguished from the case at bar:

1st. We must distinguish a sale made under and in pursuance of, and in carrying out, a contract void, because forbidden by statutes and the law prohibiting trusts and trust agreements, restraint of trade, enhancing prices, etc., and a sale made entirely outside as to a person who is not a member of the trust.

2d. We must distinguish between contracts unenforceable under the common law and cases arising where a statute has made contracts in restraint of trade or competition void; have forbidden them under penalty and have made them criminal.

3d. We must distinguish cases where the contract itself is legal, but the time or manner of making the contract alone is forbidden.

4th. We must distinguish cases arising under statutes enacted for a particular class of persons where the enforcement of the prohibition would frustrate the purpose of the statute.

5th. We must distinguish cases where, by agreement of the parties to the illegal transaction, the illegal transaction has been ended and money delivered by one person to a mere agent to be delivered to a third person, the delivery to the agent vesting title to the money or property in the other party.

6th. We must distinguish cases where the agreement which would be otherwise unlawful is held valid for the reason that the agreement is but a method upon the part of the owner of a legal monopoly of dividing up or dealing with that monopoly, as for instance, an agreement respecting patented or copyrighted articles.

Every case cited by the plaintiff comes within one or the other of these classes.

The fact that the consideration has all been executed on one side can not alter the matter. There have been many cases holding that there can be no recovery for goods sold and delivered under trust contracts, or other contract creating an illegal monopoly in restraint of trade. Among these are

Detroit Salt Co. v. *National Salt Co.*, 134 Mich., 103.
Arnot v. *Pittston & Elmira Coal Co.*, 68 N. Y., 558.
Unckles v. *Colgate*, 148 N. Y., 529, 538.
Clancy v. *Onondaga Fine Salt Mfg. Co.*, 62 Barb., 395, 405-7.
Houck v. *Brew. Assn.*, 88 Tex., 184.
Fuqua v. *Pabst Brew. Co.*, 90 Tex., 298.
Texas Brew. Co. v. *Templeman*, 90 Tex., 277.
Carriage Co. v. *Hatch*, 19 Tex. Civ. App., 120.

Other cases of executed consideration for which recovery was denied by reason of the contract being illegal be-

cause tending to create a monopoly, or in restraint of trade, are

Cravens v. *Carter-Crume Co.*, 92 F. R., 479 (C. C. A., 6th Cir.).
Bishop v. *Palmer*, 146 Mass., 469.

All the statutes relied on in this case expressly forbid the making of the contracts of which the one between the plaintiff and defendant, set out in the third defense, was a material step; expressly declare the contracts void; and expressly impose a penalty upon the making of them and expressly make them criminal.

Under these statutes such transactions and such contracts are just as illegal as gambling; as contracts to assist in the smuggling of goods; as contracts to deal in futures; as contracts to make and circulate counterfeit money; as the sale of liquor in violation of law; as contracts to assist in prostitution; or in any other way to violate criminal statutes, or in furtherance of such objects.

The cases in which recovery has been denied either of the contract price when suing on the contract or on the common counts ignoring the contract, are numerous. Some of the English cases at common law may be instanced.

If a contract of sale is illegal, there can be no recovery of goods sold in an action for goods sold and delivered. Per Ashhurst and Buller, JJ.

Alexander v. *Owen*, 1 T. R., 225.

A person who packs goods in a certain way to enable the buyer to smuggle them, can not recover in an action for goods sold and delivered.

Biggs v. *Lawrence*, 3 T. R., 454.
Waymell v. *Reed*, 5 T. R., 599.

No recovery can be had by an inn-keeper for provisions furnished to voters for a candidate, in violation of law.

Ribbans v. *Crickett*, 1 B. & P., 264, 266.

Nor by a printer for labor and materials in printing a book to which he does not affix his name, as required by statute, under a penalty.

Bensley v. *Bignold*, 5 B. & Ald., 335.
Marchant v. *Evans*, 2d J. B Moore, 14.

No recovery can be had by the seler for the value of bricks sold and delivered where the statute requires them to be of a certain size under a penalty.

Law v. *Hodson*, 11 East., 300.

So there can be no recovery by an unlicensed broker for work and labor.

Cope v. *Rowlands*, 2 M. & W. 149.

So no recovery can be had for use and occupation, after the lessor knows that the premises are used for purposes of prostitution.

Jennings v. *Throgmorton*, Ryan & M., 251.

Nor can recovery be had for the use of a conveyance hired to a prostitute to enable her to carry on her vocation.

Pearce v. *Brooks*, L. R., 1 Ex. 213.

So no recovery can be had for the value of butter sold by a farmer in firkins not branded as required by law under a penalty.

Foster v. *Taylor*, 3d Nev. & Man., 244; s. c. 5 B. & Ad., 887.

No recovery can be had on an implied contract to pay for coal sold and delivered without a ticket, as required by law, under a penalty.

Cundell v. *Dawson,* 4 C. B., 376, 397, 400.
Little v. *Poole,* 9 B. & C., 192, 199-203.

In America the cases are to the same effect.

A recovery can not be had by one privy to the unlawful design for services rendered in procuring execution of an illegal contract. See especially what is said in *McMullen* v. *Hoffman,* 174 U. S., 639, bottom of page 655.

Gibbs v. *Gas Co.,* 130 U. S., 396, 412.
Irwin v. *Williar,* 110 U. S., 499.
McMullen v. *Hoffman,* 174 U. S., 639.
Embry v. *Jemison,* 131 U. S., 336, 348.
Miller v. *Ammon,* 145 U. S., 421, 427.

One who has actively participated in an attempt to violate the law or public policy can not recover for the price of articles sold.

Hanauer v. *Doane,* 12 Wall., 342.
Sprott v. *U. S.,* 20 Wall., 459.
Kohn v. *Melcher,* 43 Fed., 641.

The state decisions are to the same effect.

In an action of assumpsit on the common counts for work and labor performed under an illegal contract after it had been rescinded it was held that no recovery could be had for value parted with under the illegal contract.

Peck v. *Burr,* 10 N. Y., 294, 297-300.
Johnston v. *Dahlgren,* 166 N. Y., 355, 358.
Brinkman v. *Eisler,* 40 N. Y. St., 865, 866.

Peck v. *Burr* contains a clear cut statement of the law. If the contract be illegal there can be no recovery under an implied contract.

Berka v. *Woodward*, 125 Cal., 119, 120, 121.
Smith v. *Albany*, 61 N. Y., 444.
Finn v. *Donohue*, 35 Conn., 216, 217, 218.

In a case already cited of *Bishop* v. *The American Preserving Co.*, 157 Ill., 284, 311-315, 320, an illustration is given of how far courts will go in leaving parties to a trust agreement where they find them. Bishop sold his stock and plant to the American Preservers Company, which was a trust, and gave it a bill of sale, receiving in return certificates for 331 shares of stock. It put him in charge of its plant as agent. He attempted to rescind and the company sued in replevin. It was held that the whole thing was illegal and the court would leave the parties where it found them. The maxim *in pari delicto* applied between the immediate parties to an illegal contract.

No recovery can be had on the common counts if the contract be illegal although fully executed.

Pike v. *King*, 16 Iowa, 49, 52.
Meader v. *White*, 66 Me., 90, 92.
Dodson v. *Harris*, 10 Ala., 566, 569.
Trowert v. *Decker*, 51 Wis., 46, 47.
Simpson v. *Nicholls*, 3 M. & W., 240, 243-4.
Stewart v. *Thayer*, 170 Mass., 560, 562-3.

Many other cases to the same effect are to be found at pages 31 to 34 of the brief in the Circuit Court of Appeals filed in this case with the answer to the petition for writ of *certiorari*.

These cases show that wherever and in whatever form the question has arisen, whether for goods sold and delivered, for money loaned, services rendered, the decisions have been uniform, that no recovery can be made on an implied contract where the express contract is illegal and the goods sold, the money loaned, or the services performed under and in pursuance of and in furtherance of an illegal contract.

Some of the cases, including *Connolly* v. *Union Sewer Pipe Company,* use language to the effect that a recovery may be had where the plaintiff is not obliged as part of his own case to disclose the illegal contract. While that may be, and undoubtedly is in some cases a good guide for determining whether the contract sued on is collateral or incidental to or a part of the illegal contract or not, it is not the only test nor is it so held to be where the question has arisen. While many cases might be cited to this effect the decisions of the Supreme Court of the United States are controlling.

As said in *Coppell* v. *Hall,* 7 Wall., 542, at page 558:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect."

See also *McMullen* v. *Hoffman,* 174 U. S. 639, at p. 665, and the leading case of *Armstrong* v. *Toler,* 11 Wheat., 258, at p. 274.

VI.

A Direct Proceeding by the State or Federal Authorities to Have the Plaintiff Declared a Trust or Combination Within the Meaning of the Anti-Trust Law is not Necessary Before a Valid Defense to a Suit on the Illegal Contract can be Set Up.

In the courts below it was argued upon behalf of plaintiff that whether the plaintiff was a trust or not must be determined in a direct proceeding and not collaterally in an action by it for the price of merchandise sold. The argument was based upon the erroneous assumption of counsel that the defense was one based solely upon the fact that the plaintiff was a trust, and reliance for this branch of the argument was had by counsel upon the decision of Judge Kohlsaat in *Lafayette Bridge Co.* v. *City of Streator*, 105 F. R., 729. This case is not really applicable because it applies only to provisions in statutes by which persons outside the trust and whose contract with the trust is not tainted with any illegality may defend against any action brought by a trust, upon the ground that the plaintiff is a trust. It has no application where, as in the case at bar, the defense is not interposed by a third person but by the party who entered into an illegal contract, and the suit is on such contract.

As has been stated, this action is not apparently on the contract which is a trust agreement, but under the short form allowed by the code on an account for goods sold and delivered, But from the defense under consideration it appears and is admitted that, the prices charged in the account are the prices fixed in the agreements including

the agreement for the sale of the wall paper, that the account arises under these agreements and that these agreements are void. This being so, the action is not one to recover the price of goods sold to third persons by a trust under a contract for the purchase and sale of goods, but to recover from a person who was a party to the illegal agreement by force of the illegal agreement. It is, therefore, clear that the facts stated in the third defense constitute a valid defense to an action for the contract price.

In the recent case of *Bement* v. *National Harrow Company*, 186 U. S., p. 70, Mr. Justice Peckham said, in reference to a similar contention, pp. 87-88:

> "Plaintiff contends in the first place that only the Attorney-General of the United States can bring an action under the statute (Sherman Act), excepting that by Section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action.
>
> "The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of misdemeanor, and on conviction is to

be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shewn to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal."

Judge Kohlsaat's decision even applied to such actions as were then in contemplation by him seems contrary to the weight of authority.

Ford v. *Chi. Milk Ship. Assn.*, 155 Ill., 166.
Nat'l Lead Co. v. *Grote Paint Store Co.*, 80 Mo. Apps., 247, 265.

VII.

THE CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANT, EVEN WHEN CONSIDERED SEPARATELY FROM THE AGREEMENTS BETWEEN THE MANUFACTURERS AND PLAINTIFF, WAS ONE IN RESTRAINT OF TRADE, SO AS TO DEBAR THE PLAINTIFF FROM RECOVERING FOR GOODS SOLD AND DELIVERED UNDER IT TO THE DEFENDANT.

Counsel for the plaintiff insist on contending that the gravamen of the third defense is, that the defendant was

the victim of the plaintiff or trust and was not a party to the illegal agreement or combination. We beg to point out, however, that while the defendant apologizes for entering into the illegal combination on the ground that it was forced to do so, as probably many of the manufacturers were who certainly were parties to the trust, nevertheless, as has been shown, the contracts, which were entered into between the manufacturers and the plaintiff, between the jobbers and the plaintiff, and between the quantity buyers and manufacturers, were parts of one general scheme to restrain trade, prevent competition, enhance prices, to fix a standard of price to the public or consumer, etc., in violation of the Sherman Act, the New York Statutes and the Ohio Statute, commonly known as the Valentine Act, above referred to.

While the defendant admittedly was not one of the original conspirators, yet by entering, with all the other jobbers in the country, into the contracts which the original conspirators outlined for them to make, containing the express agreements with respect to prices and with respect to dealing elsewhere, it thereby became itself a part of the conspiracy.

The answer distinctly states, after setting forth in substance the various contracts entered into between the different parties, including the plaintiff and the defendant, and the plaintiff and every other jobber, and the means adopted to bring about such results, and objects sought to be accomplished thereby, the following:

> "Each and all of the provisions of said contract and agreement between said members of said combination and each other; *between said so-called vendors and said plaintiff; between said*

members of said combination and said plaintiff and the so-called jobbers; between the members of said combination and trust and said plaintiff and the so-called road or quantity buyers, are each and all contrary to the provisions of the statutes of the state of New York," etc. (Rec., p. 399).

In view of these allegations and those which precede it, it is difficult to see how the plaintiff on demurrer can deny that the defendant was a party to the illegal combination. Certainly the pleader intended to make it appear so and certainly it was. Yet ignoring the allegations of the third defense of the answer which the demurrer admits; ignoring the allegation that an agreement identical with Exhibit 2 was entered into by the plaintiff with *every other jobber* of the first, second, and third class in the United States, and that an agreement identical with Exhibit 3 was entered into by the manufacturers on every sale to every other wholesaler or "quantity buyer" who were not classed as jobbers, and that these agreements were expressly contemplated and provided for in the agreements between the manufacturers and plaintiff, and ignoring the allegations that the schedule of "list prices" and discounts attached to Exhibits 2 and 3 allowed all jobbers, wholesalers and quantity buyers, [illegible] the identical schedules fixed upon between the manufacturers and the plaintiff in their agreements (Exhibit 1), as well as all provisions as to equalizing of freights, conditions and the forms the contracts were to assume—ignoring all these most material facts—counsel for plaintiff take up Exhibit 2 as if it stood alone, was the only contract made and was a

simple agreement between a vendor of wall paper and a vendee, as to the sale of a year's supply of goods.

Having thus taken the contract, and isolated it from everything else, they proceed to argue first, that its restrictions were reasonable at common law in the case of a sale of goods to be imposed by a vendor on a vendee; second, that being reasonable at common law it was not a restraint on commerce between the states and otherwise within the terms of the state and United States statutes prohibiting such restrictions, that the statutes are not supposed to cover such cases; and third, that even if illegal the illegal provisions are severable and do not prevent the enforcement of the legal provisions.

Such an argument begs the whole question at issue. The elements ignored are the elements which, conceding all that is claimed in reference to Exhibit 2, the contract relied upon, if this stood by itself, render it illegal and unenforceable. This is true, although the defendant be considered as not a party to the general illegal scheme or combination and only a party with the plaintiff and jobbers to that feature of the scheme which involved the disposition of the merchandise to which plaintiff by its contracts with the manufacturers had acquired title.

Treating the case in this narrow view, the illegality of the contract fixing the price at which defendant sold the goods, precludes a recovery from the defendant, a party to such contract, and is enforcing an illegal agreement. For, when taken in connection with the other contracts, signed by all other jobbers, wholesalers and quantity buyers—the stipulations as to prices, etc., at which they were to dispose of the goods purchased were (1) unreasonable even at common law; (2) whether reasonable or

unreasonable, were in violation of the Sherman Act and the state statutes; and (3) are not severable as one of two or more promises resting on a legal consideration; but, by reason of the form they take, were conditions precedent to any promise of the plaintiff and taint and render illegal the entire consideration by virtue of which the defendant agreed to pay *any price for the goods.*

The contracts which the defendant, in common with every other wholesaler and jobber in the country, signed (Exhibit 2, Rec., p. 419), bound the defendant and every other jobber to buy exclusively from the plaintiff. This was disguised by the provisions that the jobber "will purchase the entire requirements of the jobber" up to a certain amount; but this amount is averred in the answer to have been "at least double the entire amount purchased by the jobber during the preceding year," and "more than by any possibility could be needed by such jobber" (Rec., p. 395).

In the second place, as to credit limitations, deliveries, equalization of freight rates, discounts from list prices terms of payment, settlements, dates of invoices, etc., they impose and follow the provisions of the contract between the manufacturers and the plaintiff (Exhibit 1). Then follows (Exhibit 2, Rec., p. 419) this provision, likewise in accordance with (Exhibit 1, Rec., p. 406, 407):

> "Third. Attached hereto, marked (B), is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled.

"It is an essential condition of this agreement that the jobber will not directly or indirectly sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in Exhibit B, the intent hereof being to assure the company against the use by the jobber of this agreement to undersell the company.

"The prompt performance by the jobber of the provision of this agreement as to payment and *otherwise* is a *condition precedent* to exacting the continuous performance of said agreeemnt by the company" (Rec., p. 419-420).

Every jobber in the United States signed this contract with plaintiff. No jobber could get goods *at all* from anybody unless he did.

Every wholesaler who was not a jobber but was a "quantity buyer" signed at the time he purchased any goods from a manufacturer, who had agreed with the plaintiff to sell said goods, a contract (Exhibit 3, Rec., p. 433), containing a similar provision:

"In consideration of your having sold us wall paper, etc., at list prices and at quantity discounts as per following schedule (here follows schedule) we hereby agree not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule or lower than said list prices, and our faithful performance of this agreement is *condition precedent* to the filling of our order.

"The intent hereof is to protect you fully against being undersold by us among customers to whom you do not allow quantity discounts."

In the face of these contracts and the allegations of the answer in reference thereto, how idle it is to treat this as a case where a vendor, to protect his business, imposes a reasonable restraint on the vendee when he sells him property, real or personal?

What does it avail to cite the contract between Connolly and the Union Sewer Pipe Company, which contained similar provisions, when those provisions were not relied upo as a defense, not pleaded as such, no showing made that any other purchaser signed a similar contract, no allegation made that it was in pursuance of a plan to create a monopoly, fix prices, restrain trade, etc., and when the Supreme Court in its opinion, not only *does not mention it*, much less pass upon it?

Why quote part of the opinion in *U. S.* v. *Addyston Pipe & Steel Co.*, 85 F. R., 271, which refers to contracts at common law which were reasonable, and ignore what Judge Taft especially pointed out as a distinguishing feature of such cases. In the foregoing cases, etc., "Where," says he, page 290—

> "Such relations exist between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity *if it could be shown* that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those

> already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such case the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose." (Citing numerous cases.)

The case at bar is like the case of *Cravens* v. *Carter-Crume Co.*, 92 F. R., 479. It appears from that case, p. 483, that—

> "The trial judge held at the conclusion of the evidence, that the contracts between the plaintiff, the National Mercantile Company and the Carter-Crume Company *were not* standing by *themselves* unlawful, but that when taken in connection with the other facts which had been shown, it appeared that they formed part of an unlawful combination in restraint of trade; that they were therefore contrary to public policy and could not be enforced. He therefore directed a verdict for defendant."

This holding of the court below was affirmed by the Circuit Court of Appeals, although the plaintiff had fully executed the contract on his part.

Two cases in California fully bring out the distinction sought to be enforced in this case.

Pacific Factor Co. v. *Adler*, 90 Cal., 110:

> "A contract by the terms of which the defendant agreed to give to the plaintiff the exclusive sale of grain bags or burlaps, up to a specified

quantity, to be under the defendant's control for a specified period, and agreed to accept for them the average price received by the plaintiff for all grain bags or burlaps sold by him, and the plaintiff agreed to sell them for a specified commission and to be bound to sell a specified quantity of them, is not upon its face void as being in restraint of trade or against public policy; but if it be shown that such contract formed part of a scheme of the plaintiff to establish a monopoly in grain bags, agreement is void."

So held in action for damages for failure to deliver bags as agreed.

Santa Clara Mill & Lumber Co. v. *Hayes,* 76 Cal., 387, *syllabus:*

"The plaintiff and the defendants, who were each manufacturers of lumber, entered into a contract by the terms of which the defendants agreed to make and deliver to the plaintiff during the year 1881, two million feet of lumber at $11 per thousand feet, and further agreed not to manufacture any lumber during such period for sale within a specified territory, except under the contract and to pay the plaintiff $20 per thousand feet for any lumber manufactured and sold to parties other than the plaintiff. Similar contracts were made by the plaintiff with other lumber dealers, and its sole object and consideration in entering into such contracts was to form a combination for the purpose of increasing the price of lumber, limiting the supply, and giving it the control of the lumber market within the territory specified.

"*Held:* That the contract was in restraint of trade, it being indivisible was invalid in its entirety."

Page 392:

"Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dicated by the experience and wisdom of ages as essential to the best interests of the country and as necessary to the protection alike of individuals and legitimate trade."

Page 393:

"It is claimed by appellant that the contract is divisible and the first part (*i. e.*, to sell) can stand though the latter be illegal. If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration.

"The very essence and main-spring of the agreement, the illegal object, was to form a combination, etc. * * * The good can not be separated from the bad or rather the bad enters into and pormeates the whole contract so that none of it can be said to be good and, therefore, the subject of an action."

See also:

Straus v. *Amer. Pub. Assn.*, 85 App. Div. (N. Y.), 446, 450; affirmed 177 N. Y., 473.

Detroit Salt Co. v. *Nat'l Salt Co.*, 134 Mich., 103, 120.

Finck v. *Granite Co.*, 187 Mo., 244, 269:

> "If this contract in suit stood alone it would undoubtedly be sustained, but it did not stand alone. It was one of five others, all of which were links and necessarily links in the illegal combination which rendered them illegal."

The case of *Bement* v. *National Harrow Co.*, 186 U. S., p. 70, clearly brings out the point for which we are now contending. In that case the licensee of certain patents owned by the National Harrow Company sought to avoid the terms of his license upon the ground that certain provisions therein, which affected the sale and prices at which the merchandise was to be sold, were in violation of the Sherman Act.

The case came to the Supreme Court on error to the Supreme Court of the State of New York and there had been certain findings of fact by the referee in the court below as to the validity of the license contract, but there had been no finding of fact that any other persons than the defendant had entered into such contract or contracts of a similar kind.

Nevertheless in the Supreme Court the plaintiff in error, defendant below, attempted to rely upon the existence of similar contracts with other licensees as showing an illegal combination within the act of Congress. The Supreme Court held that it was not at liberty to go behind the findings of fact of the referee in the state court or from the record find facts in addition to those found by the referee; but, on the contrary, had to pass upon the case as if the license contracts referred to in the opinion and records as Exhibits A and B were the only contracts of that sort in existence.

So viewing them the court held in effect that, as the object of the patent laws was a monopoly any conditions not in their very nature illegal imposed by the patentee on the licensee would be upheld by the courts and could not be construed as being within the purview of the Sherman Act.

Nevertheless the court was very careful to refrain from stating what would have been its decision had the other facts urged by the plaintiff in error been found to be true by the referee, and carefully refrains from passing upon the effect of such findings if they had been made. On the contrary, the clear intimation from a reading of the opinion is that if the facts urged by the plaintiff in error had been properly before the court the conclusions reached by the court would have been different. Mr. Justice Peckham for the court, at page 85 said:

> "The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows, to regulate the sale and prices of such harrows, furnishes no grounds for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly."

And again, page 87:

> "In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought

back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress."

Finally after discussing the nature of a patent monopoly and the application of the Sherman Act and the decisions of the Supreme Court thereunder, to rights acquired from a patentee, he concluded his opinion as follows, page 94:

"It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively, owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we can not presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. *As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found.*"

In the case at bar under the allegations of the third defense, the contracts—Exhibits 2 and 3—were not only entered into with the defendant but also with all other wholesale dealers and quantity buyers of wall paper and constituted a combination together with the manufacturers who had entered into the contracts (Exhibit 1) with the plaintiff of most, if not all, of the persons engaged in the business, viz., wall paper business, concerning which the agreements between the parties to this suit were made. In other words, the elements which are lacking in the case of *Bement* v. *The National Harrow Company*, by reason of the findings of the referee are present before this court by virtue of the allegations of the third defense and the admission by the plaintiff of their truth.

It is this distinction that differentiates this case from that and also, even at common law, distinguishes the case at bar from all such cases as are set out in the brief of counsel, such as:

Amer. Strawboard Co. v. *Haldeman P. Co.*, 83 F. R., 619.
Hitchcock v. *Anthony*, 83 F. R., 779.
Navigation Co. v. *Winsor*, 20 Wall., 64.
Dunlap v. *Gregory*, 10 N. Y., 241.
Hodge v. *Sloan*, 107 N. Y., 244.

In all of these cases as well as the other cases, the restrictive covenant was held to be reasonable and not to go beyond or to have any other purpose than the legitimate protection of the vendor. There was no evidence that there was any combination to form a monopoly or enhance prices, or restrain trade. No one was party to the contract except the vendor protecting his own property.

The facts which appear in the third defense, however, as held in the California cases, above cited, this contract and its respective provisions were illegal and void. Being illegal and void, while at common law they furnished no basis for a cause of action, or a criminal prosecution, they nevertheless constituted a defense to any suit brought to enforce them.

U. S. v. *Addyston Pipe & Steel Co.*, 85 F. R., 271-279.

In the brief for plaintiff in error, stress is laid upon the decision of *Park & Sons Co.* v. *National Wholesale Druggists' Assn.*, 175 N. Y., 1, and similar cases from which it is contended that the courts in New York at least have held to be legal provisions similar to those in the contract between plaintiff and defendant even when made between combinations of manufacturers or dealers.

Park & Sons case, however, and other similar cases rest upon a foundation which has no application to the case at bar. As said by Judge Haight in his opinion in that case:

> "We must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and following this, the right also to require dealers to maintain the prices specified."

And it was said by Chief Judge Parker in that part of his opinion quoted by counsel for plaintiff in their brief below:

> "It must be borne in mind steadily that it is settled by authority that the proprietor of patent medicines has the right to fix the price at which

> his articles shall go to the consumer, and a druggist who takes his article for sale under an agreement that he will maintain the price is liable to respond in damages if he violates the contract."

Counsel for plaintiff notwithstanding these statements by the judges rendering the opinion of the court, claimed below that the court did not base its decision upon the theory that the goods involved in that case were proprietary articles.

That the case, however, is rested entirely upon that theory is conclusively shown by the later case, decided by the same court (*Straus* v. *Amer. Pub. Assn.*, 177 N. Y., 473, 476), in which a similar combination of book publishers was held to be illegal although ostensibly limited to the fixing of prices for copyrighted books, when it appeared that, in reality, it was used for enforcing the sales at fixed prices of books not copyrighted. In that case it was said by Chief Judge Parker, at page 476, after quoting from the opinion of Mr. Justice Peckham, delivering the opinion of the court in *Bement* v. *National Harrow Co.*, 186 U. S., at page 91:

> "That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the Park & Sons Co. case (175 N. Y., 1) upon which defendants apparently rest their claim that the judgment of the Appellate Divison should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein. * * * A com-

bination creating a monopoly of the sale of books *not* protected by copyright offends against the law of this state as much as if it related to blue stone (164 N. Y., 401) or to envelopes (166 N. Y., 292) and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, What may be done under the agreement?"

That a combination between jobbers is one as illegal as a combination between manufacturers is shown by the recent decision of the Circuit Court of Appeals for the Third Circuit, the opinion being rendered by Judge Gray.

Wheeler-Stenzel Co. v. *National Window Glass Jobbers' Assn.*, 152 F. R., 864.

While we thus submit, in answer to the contentions of plaintiff, that the contract between plaintiff and defendant was illegal, considered simply as part of a scheme between the plaintiff and all the jobbers of the country, because of the features in this and all other contracts with jobbers to enhance prices and enforce plaintiff's monopoly, yet we urge that our main contention be not lost sight of, that these contracts were but part of a greater scheme including the manufacturers of ninety-eight per cent. of the wall paper of the country, under which the plaintiff was but a cover for the illegal designs of the manufacturers, who were the real parties to the contracts with the jobbers. When the defendant contracted with the plaintiff to uphold the enhanced prices, it, in fact, contracted with the combined manufacturers, who did, in fact, sell it the goods pursuant to the real agreement or

conspiracy, and defendant, in common with all other jobbers, thereby made itself a party to the conspiracy and undertook to further and carry out its illegal ends.

VIII.

Even if the Restrictions Contained in the Contracts Were Reasonable at Common Law, yet, Under the Federal and State Statutes, Whether Reasonable or Unreasonable, They Were Void and Non-enforceable.

The contracts were signed in New York, and provided for the delivery of the goods f. o. b. cars at New York or Philadelphia, or at any other place the plaintiff or manufacturers chose, subject, however, in the latter event to an equalization of freights to either of said cities.

The goods were to be shipped to the jobbing houses of the different jobbers or wholesalers, and in the case of the defendant, to Cincinnati, Ohio. From that point they were to be sold by the defendant in Ohio and other states of the Union.

A provision, therefore, that no wall paper should be purchased from anyone but the plaintiff and should be sold when purchased only at certain prices, which provision was applied and enforced against every purchaser of wall paper, systematically and uniformly, certainly was a contract in restraint of trade or commerce among the several states, and an attempt to monopolize a part of the trade or commerce among the several states, and, so far as the contract fixed the prices at which goods purchased by the defendant were to be sold in Cincinnati and other

cities, for delivery in Ohio and such other states, came within the Sherman Act, as well as the Ohio statute commonly known as the Valentine Act (93 Ohio Laws, p. 143).

The contract also came within the New York statute, as it was entered into and in part performed there, and the New York statute is like the Federal statute.

It is not claimed that this contract did not, to some extent, restrain commerce between the states. It certainly did do so, and it had also for its object the creation of restrictions in trade, the increasing of the prices of merchandise, the fixing of a standard, or figure, whereby the price of merchandise to the public or consumer should be controlled or established, the prevention of competition and the other purposes denounced in the Ohio statute.

The contention, however, is made, that these statutes are not intended to prevent reasonable restrictions and that, therefore, the restrictions in the contract are to be upheld, despite the State and Federal prohibitions against contracts whose object and purpose are such as those above stated.

The courts below found that the combination and conspiracy under review in this case was unreasonable and illegal at common law, but whether reasonable or not, or void at common law or not, the decisions of this court leave no room for doubt that the agreements are interdicted by the Sherman Act and the state statutes.

If the tendency of these provisions is to restrain commerce or accomplish any of the purposes denounced in the statute, the motive in entering into them or the reasonableness of the provisions is immaterial.

U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S., 290, 328.

U. S. v. *Joint Traf. Assn.*, 171 U. S., 505, 568.
Loewe v. *Lawlor*, 208 U. S., 274; 28 Supreme Court Reporter, 301, 304.

The only question that is open in any case is as to whether or not the direct or necessary effect of the contract is to restrain commerce or to monopolize any part of the commerce between the states, as by fixing prices, preventing competition, or fixing a standard of price, etc. all of which are interdicted by both Federal and State statutes. From what has been heretofore said, that the necessary effect of the combination in question, and the contracts entered into by the plaintiff with the different jobbers and wholesalers, was to do these things which are forbidden, can not be questioned.

IX.

The Illegality is not Partial and Separable, but Vitiates and Invalidates the Whole Contract.

Counsel for plaintiff in error, while treating the contract between plaintiff and defendant as one wholly separate and independent contract between one manufacturer or vendor, and one customer, contend that, even if certain stipulations in that contract prohibiting the defendant from selling any of the merchandise purchased from the plaintiff at lower prices than those specified in the schedule annexed, and prohibiting the purchase of merchandise outside the trust, be illegal, the only effect of such illegality is to nullify these provisions and not to prevent plaintiff from recovering on the separable promise of the defendant to pay for the goods which he actually received

and kept. In support of this contention the familiar doctrine is invoked that. where one of two promises given upon one consideration is illegal and the other promise and the consideration are legal, the legal promise can be enforced by the person who has furnished the legal consideration and who in the action exacts the performance of only that which is legal, waiving the performance of that which is illegal.

This principle is sought to be applied by contending that in consideration of certain merchandise supplied by the plaintiff, the defendant promised, among other things, (1st) to buy a certain amount of merchandise from the plaintiff; (2d) to pay certain prices therefor; (3d) not to sell the same at less than certain fixed prices; (4th) and not to buy elsewhere; and that although numbers 3 and 4 may be void, yet as the consideration for 1, 2, 3, and 4 was valid, and 2 was also valid, 2 can be enforced against the defendant. While not disputing the principle sought to be invoked, its application to the case at bar can not be supported for several reasons: In the first place, as said in the case of *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 Cal., 387, the illegal object, the very essence and main-spring of the agreement, was to carry out a combination, and the good can not be separated from the bad, that is, the illegal object enters into and permeates the whole contract so that none of it can be said to be good; in the second place, the contract, on its face, shows the consideration for all the promises of the defendant to have been illegal. While agreeing to sell the entire requirements of the defendant in the business of selling wall paper for the year ending July 1st, 1899, at certain prices, less discount, it did so only upon

the "essential condition" or "condition precedent" that the defendant would not, directly or indirectly, sell, or offer for sale, any of the merchandise so purchased, below certain standard prices, and agreed to supply wall paper to the defendant only upon the condition precedent that the defendant would continuously perform that contract.

The legal effect, therefore, of this contract in the case at bar, was to render the consideration for all the defendant's promises illegal, for the promise of the plaintiff to sell paper to the defendant, which was the consideration for the plaintiff's promise to buy the paper and to pay certain prices therefor, was made upon a condition embodied in it which was illegal. The plaintiff clearly said: upon condition that you will not sell any goods that I supply you below certain prices, and upon condition that you, in common with all other jobbers, will enter into and become a part of the illegal conspiracy and monopoly, carrying out its ends in at least two ways by agreeing to buy, and in fact, buying from no one else, and agreeing to sell, and in fact, selling at trust prices fixed by me, on such conditions alone I will supply you with the goods.

The element of illegality, therefore, is involved in the consideration which passed from the plaintiff, as well as in one of the promises made by the defendant. The illegal stipulation is enforced by the enforcement of any of the promises of the defendant, since those promises are only supported by the illegal stipulation.

The language of Justice Holmes, in the opinion in *Cincinnati Packet Co.* v. *Bay*, 200 U. S., 179, 185 (p. 89 plaintiff's brief), recognizes the distinction that we are urging here. He says there that the covenant relied upo to make the transaction illegal "is not the covenant sued

upon. It is not declared to enter into the consideration of the sale," and he speaks of it again as a "subordinate undertaking of the buyer." In the contract at bar the illegal provision is no subordinate undertaking but it is expressly declared by the contract to be not only a part of the consideration for the sale, but the condition upon which alone goods could be had.

In the third place, there is a well recognized exception to the principle invoked on behalf of the plaintiff in error and now under consideration, namely: that where one of the promises is illegal or objectionable, because it is for the performance of an immoral or criminal act, it is no severable so as to render the other promise, or promises, enforceable, but in such cases it will taint the entire contract and render it unenforceable in all its parts.

This exception is pointed out in one of the cases cited by counsel for plaintiff, *Erie Railway Co.* v. *Union Locomotive & Express Co.*, 35 N. J. L., 240. In the opinion in that case Chief Justice Beasley, after citing authorities, said at page 246:

> "These and other authorities which might be referred to, settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract and render it unenforceable in all its parts by reason of the maxim *ex turpi causa non oritur actio.*"

The same limitation to the doctrine is noted in an article in 17 Yale Law Journal, 338, 341 (March, 1908), on

the subject "Void, Illegal or Unenforceable Consideration."

The same distinction was noted in the case of *U. S.* v. *Bradley*, 10 Peters, 343, 360 *et seq.* Mr. Justice Story there said:

> "That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period."

The same distinction is noted in the case of *Gelpcke* v. *City of Dubuque*, 1 Wall., 175, 221. The distinction is also noted in Hammon on Contracts, a work from which counsel for plaintiff quoted at length in his brief below. In Section 251*a* of that work the author says:

> "A distinction is to be noted between agreements which are illegal and agreements which are merely void—between agreements which the law will not aid, and agreements which the law desires to prohibit. This distinction comes out not in a comparative validity of the two, for both are void, but in the effect which their peculiar character imparts to collateral transactions. An illegal agreement vitiates all collateral transactions entered into in its furtherance, however innocent such transactions may be in themselves; but if an agreement is merely void, and not illegal, it is otherwise. Collateral transactions are not vitiated by the nullity. * * * Our present inquiry concerns the effect of illegality; and it may be laid down as a rule that the unlawfulness of a pending or contemplated transaction vitiates an otherwise lawful promise founded

upon it, so that no rights are created by the promise, or can result from it."

Reference is also made to Anson on Contracts, pp. 185, 208-210, of the 8th Ed., or 190, 213-215 of the 9th Ed., the language used in Hammon on Contracts being a condensed statement of that in Anson.

If, as plaintiff contends, the sole illegality of the contract between plaintiff and defendant lies in the covenants not to sell except at trust prices, and not to buy outside of the trust, these covenants are criminal in their nature. They are the promises whereby the defendant made itself a party to the illegal combination and agreed to carry out the purposes of that illegal combination. Those agreements were made criminal by statute. They were not merely promises which the law would not enforce, but they are those which the law seeks to prohibit. It, therefore, falls directly within the exception to the principle invoked, as it is a criminal agreement, and in such a case as is pointed out by the above authorities, the good can not be separated from the bad. In not one of the cases cited by plaintiff's counsel in his brief below on the subject of divisibility of covenants was one of the covenants illegal in the sense of being criminal or *malum in se.*

Mr. Justice Brewer, when Circuit Judge, and before the enactment of the Sherman law or the state statutes now under consideration, refused in *Burlington, C. R. & N. Ry. Co.* v. *North Western Fuel Co.,* 31 F. R., 652-657, on similar grounds, to apply the doctrine of divisibility of covenants when the evident purpose and necessary result of the contract was the building up on behalf of the promisee of a monopoly of the coal business.

Finally, contracts may be void, illegal and unenforceable even though there be no agreement by either party that is criminal. This follows from the immediate connection of the contract with the illegal purpose of one of the parties.

In Pollock on Contracts, pp. 351-354 (6th Ed.), Wald's Pollock's Contracts (3d Ed.), side pp. 484-485) it is said:

> "3. When the immediate object of an agreement is unlawful the agreement is void. * * *
>
> "4. When the immediate object or consideration of an agreement is not unlawful but the intention of one or both parties in making it is unlawful, then—
>
> "If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void. * * *
>
> "Here it is necessary to consider what sort of connection of the subject-matter of the agreement with an unlawful plan or purpose is enough to show an unlawful intention that will vitiate the agreement itself. This is not always easy to determine. * * * We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration but for the purpose of an unlawful use being made of it. All agreements incident to such transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not [*Gas Light & Coke Co.* v. *Turner*, 5 Bing. (N. C.), 666; in Ex. Ch. 6, *Ib.*, 324.] The later authorities show that the agreement is void not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it

is known to the other at the time of the agreement." * * * [*Pearce* v. *Brooks*, L. R., 1 Ex., 213.]

Gas Light & Coke Co. v. *Turner* is a case of an action on covenants of a lease, with a second count on breach of a covenant to purchase 1,000,000 gallons of tar yearly. A plea to each count was sustained that the tar was sold and the building let for the express purpose of there drawing oil of tar, and that the building so demised was of a character in which the drawing of oil was prohibited under penalty by the statute 25 George III., c. 77.

One of the cases cited by Chief Justice Tindal in the case of *Gas Light & Coke Co.* v. *Turner*, is that of *Lightfoot* v. *Tenant*, 1 B. and P., 551.

In that case a plea was sustained to an action on a bond for the price of goods sold, that the goods were sold pursuant to an agreement and in order that they might be shipped to Ostend to be there shipped on board ships, which were not licensed to trade in the East Indies, to be carried by said unlicensed ships to Calcutta for sale clandestinely. By statute, all contracts made for the loading or supplying such ships with a cargo was penalized, and it was held that the statute was concerned with those only directly within the scope of the act, and that the contract or agreement set up in the plea was not directly within the scope of the act. Nevertheless, the sale of goods to one who would use them for supplying such ships with a cargo, was illegal. In the opinion, Chief Justice Eyre said:

"Very probably those who are remotely concerned in furnishing the supply may not be directly within the scope of the act. But it will not

follow that their contracts will be valid. * * But the man who sold arsenic to one whom he knew intended to poison his wife with it would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case, but the body of the color is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling, will be thereby impelled to use his knowledge to make the contract more beneficial to himself and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very gist of the contract. * * * It is essential to his views and it enters into the spirit of his contract that the goods shall be employed according to their destination."

In *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y., 558, 566, it was said:

"The plaintiff, however, contends that notwithstanding the illegality of the stipulation of the Butler Colliery Company not to sell coal to other companies, he is still entitled to recover for the

coal actually delivered to the defendant. The coal was, as found by the referee, delivered under the illegal contract. The purpose of the vendee was against public policy and the vendor knew it. This brings us straight to the question, whether the vendor, delivering goods under such a contract, can recover for the price. I think that under the circumstances of the present case, as found by the referee, he can not. If an absolute purchase had been made by the defendant of the Butler Coal Company of any specified quantity of coal, or even of all the coal which the Butler Company could produce, that contract would have been legal, notwithstanding that the object of the purchaser was to secure a monopoly and that the vendor knew it. He had a right to dispose of his own goods, and (under certain limitations) a vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. This doctrine is established by authority and is sufficiently liberal to vendors but—and this is a very important distinction—if the vendor does anything beyond making the sale, to aid the illegal scheme of the vendee, he renders himself *particeps criminis* and can not recover for the price."

In *Hanauer* v. *Doane*, 12 Wall., 342, Mr. Justice Bradley at page 349 says:

"Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it

follow that their contracts will be valid. * * But the man who sold arsenic to one whom he knew intended to poison his wife with it would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case, but the body of the color is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling, will be thereby impelled to use his knowledge to make the contract more beneficial to himself and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very gist of the contract. * * * It is essential to his views and it enters into the spirit of his contract that the goods shall be employed according to their destination."

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"Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it

> can not be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. This is all that we mean to decide in this case."

In none of these cases was there an agreement or covenant upon the part of the defendant to do the illegal thing, yet the mere knowledge that he was going to do it, or the mere fact that the merchandise or money was furnished for the purpose of enabling him to do it, prevented plaintiff from recovering. Certainly, if it had been a part of the contract that the defendant agreed to the unlawful thing, that is, if in consideration of the furnishing of the goods by the plaintiff, the defendant had promised (a) to pay, and (b), to do the illegal thing, for which, or with knowledge of which, they, in fact, were furnished, the court would not have applied the doctrine of divisibility of covenants. The maxim, *ex turpi causa non oritur actio*, applies, whether the illegal purpose be part of the agreement or simply be understood, or, possibly, aided or abetted by the plaintiff.

In the case at bar the goods were sold to enable the defendant to engage in the unlawful conspiracy and the plaintiff not only knew of the illegal use but it insisted thereupon as a condition precedent to further dealings. It can not be possible that this plaintiff is thereby in any better position and more entitled to insist upon the per-

formance of that which was legal, than the plaintiffs in the cases just cited. Moreover, the illegality could not be waived, which seems to be a prerequiste to the application of the doctrine of divisibility of covenants, for the reason that the illegality was an accomplished thing. It was insisted upon as a condition precedent. After having received the benefit of it, it is too late for the plaintiff to claim that it waives it.

X.

The Contract in Question in this Suit is Within the Prohibitions Both of the Federal and the State Statutes.

While there is a decided difference in the verbiage of the Sherman Act, when compared with the New York statutes and the Ohio statute against monopolies and trusts, we regard these differences as entirely immaterial. The purpose and intent of each statute is practically the same in prohibiting contracts and combinations of the character involved in this suit.

The Sherman Act prohibits every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce. Any person who shall make any such contract or engage in any such combination or conspiracy, or shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce, shall be deemed guilty of a misdemeanor.

The acts of New York and Ohio prohibit the same acts when applied to matters within their jurisdictions. It is true that the New York statute is somewhat broader

in expression in that it penalizes every person "who shall make, or attempt to make, or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto," and the Ohio statute similarly prohibits and penalizes any agreement by which two or more persons "shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation, between them or themselves and others, so as to directly or indirectly, preclude a free and unrestricted competition."

The expressions quoted from the New York law and the Ohio law may more pointedly manifest the intention of the Legislature with respect to the facts set up in the answer, than does the Sherman law, because the state laws go more fully into detail. But the broad provisions of the Sherman Act, as construed by the courts in the decisions which we have already cited, are quite as effective as are the more particular prohibitions of the states in reaching any scheme which the cupidity of man or the ingenuity of counsel has so far been able to devise for the purpose of restraining trade or commerce among the states by any of the methods particularized by the state Legislature. There can be no doubt that the preventing of unrestricted competition by fixing, or keeping up, the price of any article or commodity of trade, particularly when coupled with a refusal to deal with, or sell to, one violating the provisions of such an agreement, is a restraint of trade or commerce and hence, if affecting interstate commerce, within the prohibition of the Sherman Act.

Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S., 211, 244.
Montague v. *Lowry*, 193 U. S., 38.
Loder v. *Jayne*, 142 F. R., 1010, 1014.

Since the answer was drafted in this case the later decisions of the courts have made it quite plain that such combinations and conspiracies as are set up in the answer do restrain interstate commerce.

The case just cited, of *Montague* v. *Lowry*, 193 U. S., 38, very forcibly illustrates the extent of the prohibitions of the Sherman Act, and in view of that decision, there can be no doubt of the applicability of that law to the facts relied upon.

It may be true, as was decided by the Circuit Court of Appeals for the Eighth Circuit, in *Hadley Dean Plate Glass Co.* v. *Highland Glass Co.*, 143 F. R., 242, that state anti-trust statutes can not affect a contract between a manufacturer in one state and a dealer in another state, for the manufacture in one and the delivery in the other of an article of commerce, as the Sherman law alone applies to those facts.

Nevertheless, when, by the terms of such a contract as there is in this case, a prohibition is attempted against unrestricted acts of ownership by the purchaser of goods, after they have entered into his possession and cease to be articles of interstate commerce, it would seem that the prohibitions of the state statute then apply. If the agreement involved in this suit were valid it would prevent the defendant selling below trust prices in Ohio where a part of the goods were intended to be sold by it, preventing, in other words, the free and unrestricted play of the laws

of supply and demand and the natural competition of commerce within the state.

Certainly it must be within the powers of the state to prohibit such agreements, and, unquestionably, they are prohibited by the language of the Valentine Act, as previously quoted:

> "To make or enter into or execute or carry out any contracts, obligations or agreements * * * not to sell, * * * any article or any commodity * * * below a given standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article * * * at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article * * * so as to directly, or indirectly preclude a free and unrestricted competition," etc.

In the Hadley Dean Plate Glass Co. case the defense was limited to the fact that the plaintiff was an illegal combination, and the defense was made upon a contract solely for the manufacture in one state of a commodity to be delivered in another. In the case at bar, the defense is based upon the attempt to control the defendant in the sale of goods after it had received them, which stipulation in its contract was made as a part of a general scheme between substantially all the manufacturers and with every other jobber in the country, so that it was clearly, so far as the goods which were to be resold in Ohio by the defendant were concerned, an attempt to fix, by agreement, the prices of such goods in restraint of trade and commerce in Ohio. So far as the goods were to be resold by the defendant in other states than Ohio, and so far as the

purchases by the defendant of goods from manufacturers in other states for shipment to it were limited to the trust, the Sherman law applies.

In reference to the contention on behalf of plaintiff, that an act of the Legislature of the state where the contract is made, which declares the same to be illegal can not be enforced elsewhere, we beg to submit that the two cases cited upon that point by plaintiff do not at all support the proposition. On the other hand, the provisions of such legislation have been enforced in other states, as for example, a provision of the Penal Code of New York, which is still in force, and which is applicable to this controversy, was given effect by the Supreme Court of Pennsylvania, in *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 173.

XI.

The Gist of the Arguments.

If we assume the illegality of the combination between the manufacturers, including the formation of the plaintiff company, the difference in position between the plaintiff and defendant may be thus summarized:

On behalf of plaintiff it is contended, that plaintiff, having once acquired a monopoly, it could make any contract with respect to the subject of that monopoly that any dealer or manufacturer might lawfully make with respect to his product; that it is lawful for a manufacturer to require a purchaser from him to sell only at fixed prices and buy no where else, and that a manufacturer can even require such agreements from all persons who buy from

him. Hence, it is argued, it was lawful for the plaintiff to make the contract which it did with the defendant.

It is further contended, that, even if there be any illegality in the contract, it is only in that portion of the contract requiring the defendant to sell at fixed prices, and that that clause is severable, may be disregarded and the rest of the contract enforced.

On behalf of the defendant, it is contended, that none but those having a monopoly recognized by the law, as in patented or copyrighted articles, can legally require all purchasers to maintain prices, and that it is illegal for anyone else, particularly for anyone who has illegally obtained a monopoly, to extend and enforce that monopoly by requiring all its customers to sell only at fixed prices, on penalty of not otherwise being able to obtain goods. Such agreements made, by such illegal possessors of a monopoly, with all jobbers are in direct restraint of commerce.

In those cases cited for plaintiff in this connection which do not relate to patented articles, or other articles legally monopolized, as in *Whitwell* v. *Cont. Tob. Co.*, 125 F. R., 454, and *Phillips* v. *Iola Co.*, 125 F. R., 593, it is expressly declared as a reason for the decisions, that the vendors did not have a monopoly of their respective products. Agreements, whereby competition between all the wholesale dealers in a commodity not legally monopolized, is annulled, and the prices asked by them are fixed or enhanced, are as much in restraint of trade as similar agreements between manufacturers.

(2) The contract between plaintiff and the defendant, which is in question in this suit was not the independent contract of the plaintiff nor was it made by it after the

acquisition of the commodity in an honest effort to dis pose of those goods. The goods, in reality, never were the goods of the plaintiff, but were sold to the defendant directly by the manufacturers and through their own sales organizations, using the name of the plaintiff and directing payments to be made to it as a device to cover thei illegal agreements in restraint of trade. The agreement in question, between the plaintiff and defendant, was planned before even the plaintiff was formed, as a part of the conspiracy in restraint of trade between the manufacturers, who realized that in order to keep up their own enhanced prices they must ensure the wholesalers against competition on the high level of prices which they established.

Plaintiff was formed with a nominal capital for the purpose of making these contracts with defendant and all other jobbers. These contracts made by the defendant and all other jobbers were in reality made with all the manufacturers in the combination as a part of the scheme and bound the jobbers to deal only with those manufacturers, and as a condition precedent to their getting goods, bound them to sell at the enhanced prices fixe by the combination. The agreement was, therefore, a part of the illegal scheme, made in carrying out and in furtherance of its design.

The plaintiff's argument altogether ignores those facts which are pleaded and admitted.

The language of Lord Kenyon, in *Booth* v. *Hodgson*, 6 T. R., 405, 408, and quoted in *McMullen* v. *Hoffman* 174 U. S., 639, 656, is particularly applicable to the position assumed by the plaintiff's counsel. Lord Kenyo observed that it seemed to be admitted by counsel for plaintiff—

"That if the whole case were disclosed to the court, there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

(3) When all the facts are taken into consideration, there is no room for the application of the principle of divisibility of covenants. The whole purpose and consideration of the contract was illegal, because made a: an inseparable part of an illegal scheme and in furtherance and execution of it. Furthermore, there can be no division when some of the covenants are illegal in the sense of being *malum in se* or criminal in their nature.

We respectfully submit, that on consideration of all th: facts pleaded, the demurrer to the third defense was properly overruled.

ORRIS P. COBB,
MORISON R. WAITE,
Counsel for Respondent.

APPENDIX.

(1) SHERMAN ACT.

The provisions of the Sherman Act, being the statute of July 2d, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," Twenty-sixth Statute, 209, so far material is here printed for convenience of reference:

> "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine, not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such

territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the district of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(2) New York Statute.

The New York statute in existence at the time the combination was formed, and at the time of the sale of the most of the goods, was Chap. 383, of the Acts of New York, 1897, which became a law May 7, 1897. This act was amended by Chap. 690, of the Laws of 1899, which became a law May 25, 1899. There is no change, however, in Sections 1 and 2 of the amended Act from Sections 1 and 2 of the Act of 1897. These sections are the same in each act; are those which define the combination in restraint of trade and fix a penalty, and are the only ones material in this controversy. They are as follows (Acts N. Y. Chap. 690, Laws 1899):

"Section 1. Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established, or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade, or occupation, is or may

be restricted or prevented, is hereby declared to be against public policy, illegal and void.

"SEC. 2. Every person or corporation, or any officer or agent thereof, who shall make, or attempt to make or enter into any such contract, agreement, arrangement or combination, or who, within this state, shall do any act pursuant thereto, or in, toward, or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and, on conviction thereof, shall, if a natural person, be punished by a fine not exceeding five thousand dollars, or by imprisonment for not longer than one year, or by both." * * *

(3) OHIO STATUTES.

The Ohio act, known as the Valentine Act, and applicable to this controversy, is that of April 19, 1898, 93 O. L., 143. The provisions of that act material to this controversy, are these:

"SECTION 1. *Be it Enacted by the General Assembly of the State of Ohio*, That a trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase, or reduce the price of merchandise or any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce

intended for sale, barter, use or consumption in this state.

"5. *To make or enter into or execute or carry out any contracts,* obligations or agreements of any kind or description, *by which they shall bind, or have bound themselves not to sell,* dispose of or transport *any article or any commodity or any article of trade,* use, merchandise, commerce or consumption, *below a common, standard figure or fixed value,* or by *which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others,* so as to directly, or indirectly, preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy, and void.

"SEC. 4. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, shall be punished by a fine of not less than fifty ($50) dollars nor more than five thousand ($5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both

such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

"SEC. 8. That any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity.

"SEC. 9. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state."

The constitutionality of the Ohio law has been twice sustained by the Supreme Court of the state—

State, ex rel Monnett, v. *Buckeye Pipe Line Co.,* 61 O. S., 520.
State v. *Gage,* 72 O. S., 210.

FILED.
APR 27 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1907.

CONTINENTAL WALL PAPER COMPANY,
Petitioner,

against

THE LEWIS VOIGHT & SONS COMPANY,
Respondent.

No. 15

Supplemental Brief on Behalf of Respondent.

The original brief on behalf of respondent was in the press before receipt of that upon behalf of the petitioner.

The opening paragraph in petitioner's brief is as follows:

> "The action is the ordinary common law action to recover for goods sold. The course of procedure on the trial of such an action would be to prove the sale and delivery of the goods. It would be unnecessary for the plaintiff to prove any of the matters set forth in the answer, or to rely upon any of the contracts therein pleaded."

That statement was emphasized in oral argument. Much of the brief upon behalf of petitioner seems based upon the same assumption.

In the brief upon behalf of the respondent on the other hand, it is urged that this action, though in the short form permitted by the Ohio Code, is nevertheless in fact an action upon the illegal contract, Exhibit 2, of the third defense, and that plaintiff would have to rely upon that contract for recovery. The form of this action is governed by what was Section 122 of the original Ohio Code of Civil Procedure, now Section 5086 of the Revised Statutes of Ohio. That section reads as follows:

> "In an action, counterclaim, or set-off, founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum which he claims with interest. * * *"

Under the Ohio authorities, it is not requisite for the maintenance of an action on such pleading, that there should really have been prior to the beginning of the action an account or book entries. It is sufficient that the items sued upon be such as ordinarily form the subject of items in account books.

> *Black* v. *Chesser,* 12 O. S., 621,
> *Horning* v. *Poyer,* 18 C. C. Rep., 732.

Neither is this form of action limited to the case of sales of goods. It can be employed in any case of special contract where fully performed on one side.

> *City of Cincinnati* v. *Cameron,* 33 O. S., 336, 356,
> See also 2 Bates' Pleadings, Practice, Parties and Forms, 863, par. 3.

The form of the pleading, as shown by the reports of the cases above cited, does not dispense with the proof of the facts creating the liability, including, of course, the proof of whatever contract may be the foundation of that liability, whether express or implied.

In the case at bar we have an express contract, "Exhibit 2" (Rec., p. 419), in which the parties agreed upon the prices, the discounts, the terms of payment, the allowance of freights and other matters, all of which will have necessarily to be proved to enforce the liability asserted against the defendant. Every order given by defendant for wall paper was given under and pursuant to that contract, Exhibit 2. That is not only the effect of the contract itself, but of the admitted allegations of the third defense:

> "These defendants aver that the prices charged in said Exhibit attached to said amended petition, are the prices fixed and determined in pursuance of, and by the combination or trust agreement, as above set forth * * * * In transacting all business aforesaid, at all said times, said business was transacted under and in pursuance of said combination or trust agreement, and for the purposes, and each of them, above specified, and not otherwise.
>
> "The allegations in said plaintiff's petition set forth as a suit on account, are an attempt to enforce, carry out and recover upon, and by virtue of said unlawful combination, aforesaid, the prices fixed by such combination * * *" (Rec., p. 399).

In the face of the allegations of this defense, the suggestion in oral argument, that the sales of the goods for which this is an action to recover the price, were distinct, uncon-